APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 94-2250WM

Dr. Joseph C. DeBlase; Ben Cerra,
Appellants,
v.

CIGNA Individual Financial Services Company; CIGNA Corporation; CIGNA Securities, Inc.; Nicholas DiSette,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 16, 1994
Filed: November 22, 1994

Before FAGG, WOLLMAN, and HANSEN, Circuit Judges.

PER CURIAM.

Joseph C. DeBlase and Ben Cerra appeal the district court's orders granting summary judgment on DeBlase's and Cerra's claims for fraud, negligence, and breach of fiduciary duty. We review a grant of summary judgment under a well established standard. Because this is a diversity action, we review de novo questions of state law. Having considered the

record and the parties' briefs, we are satisfied that the issues do not warrant a comprehensive opinion and that the record supports the district court's rulings. We thus affirm the district court. See 8th Cir. R. 47B.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2250WMKC

Dr. Joseph C. DeBlase; Ben Cerra,
Appellants,

v.

CIGNA Individual Financial Services Company; CIGNA Corporation; CIGNA Securities, Inc.;
Nicholas Disette,
Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 19, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 91-0642-CV-W-2

Dr. Joseph C. DeBlase and
Ben Cerra,
Plaintiffs,

vs.

CIGNA Individual Financial Services, et al.,
Defendants.

AMENDED ORDER

I. INTRODUCTION

Pending before the court is defendants' motion for summary judgment. Plaintiffs are seeking to recover funds lost in various investments orchestrated by defendant, DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as CIGNA).[4] Plaintiffs filed this action in state court and

[4] The other named defendants are CIGNA Individual Financial Services Company, CIGNA Corporation and CIGNA Securities.

defendants subsequently removed to federal court. On January 29, 1993, plaintiffs filed an Amended Complaint which states five counts: Count one alleges that DiSette, acting as an employee of CIGNA, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of CIGNA, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of CIGNA, acted negligently towards plaintiffs; Count Four alleges that CIGNA was negligent in hiring and supervising DiSette; and Count Five alleges that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986). Plaintiff also seeks punitive damages in Counts One, Two and Five.

Defendants move for summary judgment arguing that: (1) Plaintiff DeBlase's action is precluded (for the most part) by the controlling statute of limitations; and (2) Written disclosures to the plaintiffs negate all claims flowing from alleged oral representations made by DiSette to plaintiffs.

II. STANDARDS GOVERNING SUMMARY JUDGMENT

A movant is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great National Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party, according the non-moving party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 179-80 (W.D. Mo. 1985).

Recently, the Supreme Court has redefined the standards to be considered in ruling on summary judgment motions. Where, as in this case, the party moving for summary judgment does not bear the ultimate burden of persuasion at trial that party must make a prima facie showing "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323.

If the moving party meets this requirement, the burden shifts to the non-moving party who must produce sufficient evidence to manifest a dispute as to the material facts. To successfully meet this burden the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the, material facts." *Matsushita*

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, the party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby Inc., 474 U.S. 242, 248 (1986).* Finally, "[i]n assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a)." Id. at 250. If a rational trier-of-fact, considering the record as a whole, could not find in favor of the non-moving party, then a trial is unnecessary. *Matsushita*, 475 U.S. at 586.

III. ANALYSIS

Defendants attack plaintiffs' claims on two fronts. First, defendants contend that all of plaintiff DeBlase's claims arising out of investments made before 1986 (eight of the ten investments made by DeBlase) are time-barred by Mo. Rev. Stat. § 516.120 (1986) (five year statute of limitations triggered by notice of the alleged fraud). Second, defendants attack the allegation underlying all of plaintiffs' claims, arguing that no fraud or misrepresentation exists as a matter of law.[5] Both of defendants' arguments turn on the issue of notice. The answer to a single question will ultimately decide both prongs of defendants' motion: When were plaintiffs put

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[5] The primary allegation undergirding plaintiffs claims is that the defendants, through DiSette, made material and fraudulent oral representations concerning the degree of risk and stability of the investments made by plaintiffs. All claims are inherently linked to this allegation. Therefore, defendants seek to invalidate all of plaintiffs' claims by challenging this primary allegation.

on notice that the investments were not low-risk, stable investments but were volatile and speculative in nature?[6] Defendants contend that the "offering materials"[7] provided to plaintiffs (prior to, or at the time of, investment) clearly and unequivocally gave plaintiffs notice that the investments were high risk and not stable. Plaintiffs argue that, at a minimum, there is a genuine dispute of fact concerning when they received notice of the investments's risks.

There is no dispute that plaintiffs signed subscription agreements contemporaneously with each investment. Defendants contend that these subscription agreements provided the critical notice to plaintiffs in two respects. First, in most cases the express terms of the agreements themselves stated that the investments were high risk.[8] Second, the

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[6] The answer to this question will resolve the issues presented by both prongs of defendants" motion. The point in time that DeBlase was given notice of the true nature of the investments will mark the beginning of the statute of limitations period. Further, if notice of the high risk nature of the investments preceded, or was contemporaneous with, the investments, plaintiffs' misrepresentation claims must fail as a matter of law.

[7] Defendants define the "offering materials" as written disclosures provided to plaintiffs including an investor questionnaire, a subscription agreement and a private placement memorandum (a document similar to a prospectus, referred to hereafter as a "PPM").

[8] The following subscription agreements (attached as exhibits to Defendants' Suggestions in Support of the Motion for Summary Judgment) signed by DeBlase clearly indicated the high risk associated with the investments:

Exhibit F-1, p. D-3 ¶4(k)(i); Exhibit F-2, p. D-3 ¶4(k)(i);
Exhibit F-3, p. C-3 ¶4(k)(i); Exhibit F-4, p. D-3 ¶4(k)(i);
Exhibit F-5, p. C-3 ¶5(l)(i); Exhibit F-7, p. E-2 ¶3(l)(i);

subscription agreements, in one form or another, provided that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. The PPMs leave no doubt as to the high risk, speculative nature of the limited partnership investments.[9] Indeed, the PPMs often began with capitalized, bold-faced warnings such as: THE INVESTMENT INVOLVES A HIGH DEGREE OF RISK. Further, throughout the text of the various PPMs the speculative nature of the investments was clearly and redundantly manifested.

To grant summary judgment in favor of defendants, the court must ultimately find that the only conclusion that a rational trier-of-fact could reach is that plaintiffs had notice of the speculative nature of the investments prior to, or at the

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Exhibit F-9, p. B-5 ¶¶4(j) & 4(l); and Exhibit F-10, p. IV-6 ¶¶8 & 20.

Those signed by Cerra stating the risks involved are:

Exhibit G-1, p. B-5 ¶¶4(j) & 4(l); Exhibit G-2, p. IV-6 ¶¶8 & 20; and Exhibit G-4, p. 3 ¶3(b).

[9] The PPMs associated with the DeBlase investments repeatedly indicated the high risk involved with these investments. See Exhibit F-1, pp. (ii) & 32; Exhibit F-2, pp. (ii) & 30; Exhibit F-3, p. (iii); Exhibit F-4, p. (ii); Exhibit F-5, pp. (iv-v) & 45; Exhibit F-6, pp. (i) & 19; Exhibit F-7, pp. (i) & 26; Exhibit F-8, pp. (i) & 27; Exhibit F-9, pp. v & 45; and Exhibit F-10, cover page and pp. (i) & 49.

The PPMs associated with Cerra's investments also clearly stated the risks involved. See Exhibit G-1, pp. v & 45; Exhibit G-2, cover page and pp. (i) & 49; Exhibit G-3, pp. (i) & 27; Exhibit G-4, pp. (i) & 18; and Exhibit G-5, pp. (ii) & 48-49.

time of, investment (or in the case of DeBlase, beyond the statute of limitations). *See generally Matsushita*, 475 U.S. at 586. The linchpin of defendants, motion is the claim that the signed subscription agreements establish, as a matter of law, that plaintiffs invested money with full notice of the true nature of the investments. With full disclosure to plaintiffs of the risks involved in these investments, defendants argue that plaintiffs' claims of misrepresentation and fraud must fail as a matter of law. The court agrees and will grant the motion for summary judgment accordingly.

Plaintiffs' defense to the motion is that they signed the subscription agreements without reading the offering materials and that DiSette "went to great lengths to conceal material information from the plaintiffs." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 15. That is, DiSette allegedly assured plaintiffs that they did not need to read the offering materials and thereby deceitfully deprived them of the knowledge contained in the written disclosures. "[B]oth plaintiffs have testified that they often time were not even given an opportunity to read the entire document, and [were] simply presented with a stack of documents with post-it notes indicating where they should sign. DeBlase even testified that there were occasions when the only page he received of the multi-page documents was the one which he was to sign." Plaintiffs' Suggestions in Opposition to the Motion for Summary Judgment, p. 14 (emphasis in original). The court rejects plaintiffs' argument.

The subscription agreements and the PPMs unequivocally stated the inherent risk of the investments. Plaintiffs had full knowledge of the existence of all these documents (they signed the subscription agreements and the agreements clearly referenced the PPMS) and simply chose not to review them. There has been no evidence that DiSette refused to produce these documents upon request, prevented plaintiffs from examining these documents or otherwise concealed their existence. Instead, plaintiffs seem to infer that DiSette's alleged assurances that plaintiffs need not review these documents somehow prevented them from examining the documents. The court cannot agree. Knowing that these documents existed, plaintiffs made a conscious choice not to bother themselves with the specific information available to them. Rather, plaintiffs signed the subscription agreements without review and now claim that their reliance on the alleged oral assurances of DiSette should insulate them from the disclosures made in the agreements. This position is untenable.

"Under Missouri law, a person who has an opportunity to read a document but signs it without doing so is held to have knowledge of the document's contents, absent a showing of fraud." *United States of America for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Plaintiffs have failed to make any showing that fraud prevented them from understanding what the subscription agreements clearly stated; specifically, that the investments carried a high risk and that plaintiffs had "received and read or reviewed" the PPMS. The *Bussen Quarries* presumption

is not invalidated simply because some kind of alleged fraud exists in the action. Rather, this court understands *Bussen Quarries* to mean that the presumption is valid unless the alleged fraud either created a misapprehension as to the meaning or effect of the signed agreement, or induced plaintiffs to sign. The fraud alleged by plaintiffs does not affect the validity of the signed subscription agreements and therefore plaintiffs are deemed to have full knowledge of the subscription agreements and PPMs.[10]

Further, this court finds the Eighth Circuit's decision in *Davidson v. Wilson*, 973 F.2d 1391 (8th Cir. 1992), dispositive of plaintiffs' argument. In *Davidson*, the court was faced with two investors suing the agent, and the securities company employing the agent, that sold them shares in a high risk limited partnership. *Id.* at 1392. The plaintiffs alleged fraud because the investments did not meet alleged oral representations made by defendants. *Id.* However, the plaintiffs received and signed subscription agreements prior to making the investments. *Id.* at 1399.

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[10] Plaintiffs seem to argue two related manifestations of the alleged fraud: (1) That plaintiffs should rely totally on DiSette without reading the offering materials; and (2) The original statements of DiSette concerning the low-risk nature and stability of the investments. The court finds that plaintiffs have not set forth specific facts showing that DiSette represented that the investments were stable and low risk. However, even assuming that these representations did occur does not allow plaintiff to overcome the Bussen Quarries presumption. Fraud as to the speculative nature of the investments did not prevent DeBlase from understanding the content or effect of the subscription agreements, nor did it fraudulently induce plaintiffs to sign. Further, while DiSette's alleged assurances to plaintiffs may have been poor counsel, it does not rise to the level of fraud. Accordingly, the court finds that plaintiff have failed to show any possible fraud foreclosing the Bussen Quarries presumption.

These agreements made clear the risky nature of the investments and also referenced other documents disclosing the risks involved. *Id.* at 1396-1400.

The district court granted defendants' motion for summary judgment, holding that the plaintiffs "may not justifiably close their eyes to the written materials and rely only upon the oral statements, and that [plaintiffs] accordingly are charged with constructive knowledge of the written materials available to them." Id. at 1398. The Eighth Circuit affirmed, finding that:

> a sophisticated investor, confronted with a written document which contained repeated references to two other documents . . . and that also contained explicit disclaimers . . . did not justifiably rely upon any contradictory oral representations. There was ample reason for [plaintiffs] to take the position, that they would not move ahead and make investment payments until such references and representations were clarified to their satisfaction. Thus, we agree with the district court that, based upon the facts of this case, [plaintiffs'] claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law.

Id. at 1401.

The factual and legal similarities between this action and *Davidson* compel an identical result. Admittedly, plaintiffs DeBlase and Cerra are not as financially sophisticated as the investors in *Davidson*, but neither are

they unsophisticated.[11] Plaintiff DeBlase is highly educated with significant experience in investing and financial matters. Deposition of Joseph DeBlase, pp. 33-34, 47, 48 56, 64, 66, 68 & 72-73. Plaintiff Cerra has owned and operated two successful construction corporations for a number of years.[12] Deposition of Ben Cerra, p. 10-13. Armed with a reasonable degree of business sophistication, plaintiffs were confronted with subscription agreements containing explicit disclaimers as to risk and/or referencing additional risk disclosing documents. Plaintiffs made a knowing and intelligent waiver of their right to review these materials before investing and relied blindly on the alleged oral representations of DiSette. Given these facts, the court must find that plaintiffs' "claimed reliance upon [defendant's] oral representations was unjustifiable as a matter of law." *Id.* at 1401.[13]

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[11] Plaintiffs have set forth considerable facts in an effort to establish their financial unsophistication. However, the significance of sophistication is muted by the patent and unequivocal risk disclosures in the subscription agreements and PPMS. The court finds that no great degree of sophistication was needed to be aware of the speculative nature of plaintiffs' investments.

[12] Plaintiff Cerra also indicated on one subscription agreement that "I have such knowledge and experience in financial and business matters and in tax-oriented investments in particular that I am capable of evaluating the merits and risks of an investments in the securities." Defendant's Suggestions in Support of the Motion for Summary Judgment, Exhibit G-5, p. A-1--7.

[13] The court in Davidson reviewed the plaintiffs,' claim of justifiable reliance within the analytical framework set forth in Zobrist v. Coal-X, Inc., 708 F.2d 1511 (10th Cir. 1983). In reviewing claims of justifiable reliance, the relevant factors are:

> (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the

IV. CONCLUSION

As a matter of law, plaintiffs cannot justifiably rely on the alleged oral representations of DiSette. Rather, pursuant to the *Bussen Quarries* presumption and the holding in *Davidson v. Wilson*, the plaintiffs had actual (or at a minimum constructive knowledge) of the high risk, speculative nature of the limited partnerships at the time of investment. It follows then that both prongs of defendants' motion for summary judgment are valid. *See supra* note 3 and accompanying text.

As previously stated, all claims stated in plaintiff's Amended Complaint are inherently founded upon an

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stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.

Davidson, 973 P.2d at 1400 (quoting Zobrist, 708 F.2d at 1516). In addition to finding plaintiffs reasonably sophisticated in financial matters, this court finds the other factors weigh heavily in favor of granting the motion for summary judgment. Most significantly, the court finds that plaintiffs had full access to the relevant information (although they chose to ignore the materials); it cannot reasonably be found that DiSette concealed this information; and plaintiffs had every opportunity to detect the alleged fraud by simply reading the documents they signed and/or represented that they had reviewed. Further, while DeBlase offers some evidence of a personal relationship with DiSette, neither plaintiff sets forth facts establishing a fiduciary relationship. Under Missouri law, a confidential or fiduciary relationship exists where one party, through ignorance (such as ignorance concerning finance and investments), "has become subservient to the dominant will of another, that the property of the subservient person has come into the possession or management of the dominant person, that the subservient person has surrendered his independence, and that there has been manipulation of the actions of the subservient party who has placed has trust and confidence in the dominant person." Neal v. Sparks, 773 S.W.2d 481, 486 (Mo. Ct. App. 1989). No facts offered by plaintiffs would support a finding that they had surrendered their independence to DiSette.

In weighing all of the Zobrist factors applied in Davidson, this court finds that plaintiffs are not, as a matter of law, entitled to the protections of justifiable reliance.

allegation of fraudulent representation concerning the nature of the investments. *See supra* note 2 and accompanying text. Having found that this allegation fails as a matter of law, the court finds that all claims stated in the Amended Complaint must fail. Accordingly, it is ORDERED that defendants' motion for summary judgment as to all of plaintiffs' claims (Counts I through V) is GRANTED.

/s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 27, 1993
Kansas City, Missouri

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

AMENDED
JUDGMENT IN A CIVIL CASE

Case No. 91-0642 CV-W-2

DR. JOSEPH C. DEBLASE and,
BEN CERRA,
Plaintiffs,

vs.

CIGNA INDIVIDUAL FINANCIAL
SERVICES, et al.,
Defendants.

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ Decision by Court. This action was briefed by the parties. The issues were reviewed and a decision has been rendered.

IT IS ORDERED that

defendants' motion for summary judgment as to all of plaintiffs' claims (Counts I through V) is GRANTED.

May 27, 1993 — R. F. Connor
Date — Clerk

/s/ Rhonda Ens
(by) Deputy Clerk

Entered on May 28, 1993

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 91-0642-CV-W-2

Dr. Joseph C. DeBlase et al.,
Plaintiffs,

vs.

CIGNA Individual Financial
Services Company et al.,
Defendants.

ORDER

I. INTRODUCTION

Plaintiffs in the above titled action are seeking to recover funds lost in various high risk investments orchestrated by defendant, Nicholas DiSette, who was allegedly acting within his capacity as an employee of the other three defendants (known collectively herein as CIGNA).[1] Plaintiffs claim that they instructed DiSette to provide them with low risk investments and that instead, DiSette proffered high risk investments. Plaintiffs claim that, despite the fact that the offering materials and subscription agreements which accompanied each investment stated that the investments were high risk, they signed the subscription agreements without

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[1]The other named defendants are Cigna Individual Financial Services Company, Cigna Corporation and Cigna Securities.

reading the offering materials and were unaware of the risks because DiSette assured them that there was no need to read them. Plaintiffs' Amended Complaint states five counts: Count One alleges that DiSette, acting as an employee of CIGNA, made fraudulent representations to plaintiffs concerning investments; Count Two alleges that DiSette, acting as an employee of CIGNA, violated his fiduciary duty to plaintiffs; Count Three alleges as an alternative to Counts One and Two, that DiSette, acting as an employee of CIGNA, acted negligently towards plaintiffs; Count Four alleges that CIGNA was negligent in hiring and supervising DiSette; and Count Five alleges that defendants' actions were unlawful under the Missouri Merchandising Practices Act, specifically Mo. Rev. Stat. § 407.020.1 (1986).

On May 27, 1993, this court issued an order granting defendants' motion for summary judgment as to all counts of plaintiffs' complaint. On June 9, 1993, plaintiffs filed a motion for reconsideration of the May 27 Order. On November 17, 1993, the court, upon reconsideration, upheld the May 27 Order granting summary judgment as to Counts I and V but denied summary judgment as to Counts II through IV for lack of specific arguments regarding these claims. The November 17 Order allowed defendants to renew their motion for summary judgment as to Counts II through IV by specifically addressing these claims. Pending before this court is defendants' renewed motion for summary judgment on Counts II through IV of plaintiffs' complaint.

II. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure permits summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

as to any material fact and that the moving party is entitled to judgment as a matter of law."

The key to determining whether summary judgment is proper is ascertaining whether there exists a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party. The party moving for summary judgment has the burden of proving that these requirements for summary judgment have been met. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In a summary judgment analysis, a court must first consider whether there are any issues of fact. If the only issues are issues of law, then summary judgment is appropriate. *Sheline v. Dun & Bradstreet*, 948 F.2d 174, 176 (5th Cir. 1991).

If issues of fact are raised, a court must consider whether these issues are material to the outcome of the case. Materiality is identified by the substantive law that is to be applied. *Anderson*, 477 U.S. at 248. Factual disputes that are collateral to the substantive law will not preclude summary judgment. *See Id.*

In addition to the requirement that a dispute of fact be material, the dispute must also be genuine. A dispute of fact is considered genuine if the non-moving party has produced sufficient evidence such that a reasonable jury could return a verdict for that party. *Id.* at 249. When considering a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 255. If the evidence submitted by the non-

moving party is merely colorable or is not significantly probative, then summary judgement may be granted. *Id.* at 249-50.

Where the party moving for summary judgment does not bear the burden of proof at trial, that party must show "that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. at 325. This burden is met when the moving party identifies portions of the record demonstrating an absence of a genuine issue of material fact. *Id.* at 323. If the moving party meets the requirement, the burden shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 474 U.S. at 248. The trial judge then determines whether a trial is needed. "[Wlhether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

III. ANALYSIS

A. Count III

Count III of plaintiffs' complaint is a negligence claim against defendant DiSette. Plaintiffs claim that DiSette was negligent in assuring plaintiffs that they need not read the offering materials for the investments that they made and by advising and encouraging plaintiffs to invest in high risk investments after analyzing their net worth and financial needs.

In any action for negligence, the plaintiff must establish that (1) the defendant had a duty to the plaintiff, (2) the defendant failed to perform that duty, and (3) the defendant's breach was the proximate cause of the plaintiff's injury. *Martin v. City of Wash.*, 848 S.W.2d 487, 493 (Mo. 1993) (en

banc). In this case, the court finds that plaintiffs have failed to prove that DiSette breached a duty owed to them.

The relationship between DiSette and the plaintiffs was a financial advisor/investor relationship. In this relationship, the plaintiffs had discretion over their investments, that is DiSette was not authorized to engage in investments without plaintiffs' approval. The Missouri Court or Appeals discussed the duties owed by a financial advisor to his investors in a non-discretionary account in *Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746 (Mo. App. 1990). In *Vogel*, the court found that these duties are somewhat limited and include the duties to: (1) study a stock before recommending it; (2) inform the customer of the risks involved in the particular transaction; (3) refrain from self dealing and misrepresentation; (4) follow the customer's order; and (5) disclose any personal interest in the transaction. *Id.* at 752.

Plaintiffs in this case have failed to prove that any of these duties have been breached. Plaintiffs have presented no evidence that DiSette failed to study the investments before recommending them, was self dealing, failed to follow their orders, or that he had any personal interest in the transactions.

While plaintiffs contend that DiSette failed to inform them of the risks involved in the particular transaction, this court has previously found that most of the subscription agreements signed by plaintiffs for each investment stated that the investments were high risk. Furthermore, each subscription agreement stated that plaintiffs had "received and read or reviewed" each PPM (detailing the high risk nature of the investments) accompanying the individual investments. Under Missouri law, the plaintiffs are deemed to have full knowledge of any documents they signed. *United States for the use of Bussen Quarries, Inc. v. Thomas*, 938 F.2d 831, 833 (8th Cir. 1991). Therefore, this court found that

plaintiffs were held to have knowledge of the high risk investments. (Order of Nov. 17, 1993, at 10.) This court also found that plaintiffs' reliance on oral representations made by DiSette was unjustifiable as a matter of law. (Order of November 17, 1993, at 12 (citing *Davidson v. Wilson*, 973 P.2d 1391, 1401 (8th Cir. 1992).) Consequently, plaintiffs cannot claim that DiSette failed to inform them of the risks involved in the transaction.

Plaintiffs also cannot prove that any misrepresentation occurred. Under the theories of negligent and intentional misrepresentation, a plaintiff must prove reliance. *See Frame v. Boatmen's Bank*, 782 S.W.2d 117, 121 (Mo. Ct. App. 1989) (stating the elements for negligent misrepresentation); *Marler v. House*, 637 S.W.2d 365, 367 (Mo. Ct. App. 1982) (stating the elements for intentional misrepresentation). As discussed previously, this court has found as a matter of law that plaintiffs could not justifiably rely on alleged oral statements made by defendant DiSette. Therefore, plaintiffs cannot prove the necessary elements for misrepresentation.

The court finds that plaintiffs are unable to show that DiSette breached any duty owed to them according to Missouri law. Plaintiffs claim that DiSette breached his duty by advising and encouraging plaintiffs to invest in high risk investments after analyzing their net worth and financial needs. Thus, plaintiffs appear to allege that DiSette owed them a duty to provide prudent investment advice. The Missouri Court of Appeals, however, has found that a broker must "manage the account in a manner directly comporting with the needs and objectives of the customer" only when the account is a discretionary one, that is when the broker has the authority to enter into investments without the approval of the investor. *Vogel*, 801 S.W.2d at 752. In this case, the accounts were non-discretionary. Plaintiffs had the ultimate decision of whether or not to proceed with the investments.

Plaintiffs may not impose a greater duty on DiSette than exists under Missouri law. Because plaintiffs cannot show that DiSette breached a duty owed to them under a non-discretionary account, the claim of negligence under Count III must fail and defendants" motion for summary judgment on this count is granted.

B. Count II

Count II of plaintiffs' complaint is a claim for breach of fiduciary duty. The fiduciary duties owed by defendant DiSette to plaintiffs are set forth in the *Vogel* case which was discussed in the analysis of Count III of plaintiffs' complaint. The discussion of Count III found that plaintiffs have failed to show that DiSette breached any of these duties. Consequently, defendants' motion for summary judgment on Count II is granted.

C. Count IV

Count IV alleges that CIGNA was negligent in hiring and supervising DiSette and is derivative of claims against DiSette. Because this court has granted defendants' motion for summary judgment on all counts alleged directly against DiSette, Count IV cannot survive. Therefore, defendants' motion for summary judgment on Count IV is also granted.

Accordingly, it is ORDERED that defendants' renewed motion for summary judgment is GRANTED.

/s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: March 29, 1994
Kansas City, Missouri

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 91-0642-CV-W-2

DR. JOSEPH C. DEBLASE, at al.,
Plaintiff(s),

v.

CIGNA INDIVIDUAL FINANCIAL
SERVICES COMPANY, et al.,
Defendant(s).

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to the court's order dated 11/17/93, defendants' motion for summary judgment is GRANTED in part and DENIED in part. This order amended and superseded the court's order of 5/27/93;

that pursuant to the court's order of 3/29/94, defendant's renewed motion for summary judgment is GRANTED.

March 29, 1994 R. F. Connor
Date Clerk

/s/ Rhonda Ens
(by) Deputy Clerk

Entered on Mar 29, 1994